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ABSTRACT

Given the role that initiatives and referenda have played in state and local governance, it is interesting that there has never been a national initiative or referendum in the United States. The reason for this is that the Constitution of the United States does not provide for direct citizen initiation of, or direct popular votes on, either statutes or constitutional amendments. Discussion of why there is no provision for national processes of initiative or referendum and whether there should be such a provision leads inevitably to a discussion of questions about democracy and representation. In addition to supplying background on the formative debate concerning those issues and to tracing a history of the democratic impulse as it relates to the issue of national initiative and referendum, the pamphlet presents various contemporary points of view as well as arguments for, and arguments against, a national initiative and referendum process. (BZ)

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"TO COLLECT THE WISEST SENTIMENTS"

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Direct Democracy and Representative Government

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A Guide for Discussion of Proposals for a National Initiative and Referendum Process

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Written by W. Richard Merriman, Jr.

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"All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

—Article I, Section 1

The famous opening words of the Declaration of Independence announce the "self-evident" truths "that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." The Declaration lists further truths:

> *That to secure these rights, Governments are instituted among Men deriving their just powers from the consent of the governed.*
>
> *That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.*

These ideas were not new in 1776. The great English philosopher John Locke had made similar claims almost a century before. What was unique about the American situation at the time of the Revolution was the readiness and ability of Americans to translate these philosophical truths into practical action in the real world of politics.

The history of Massachusetts provides a good example of how seriously Americans took the claims that governments were their creatures—their creations—and that the authority of such governments derived from the consent of the governed. After the Declaration of Independence the Massachusetts House of Representatives adopted a resolution announcing the interest of the state government in drafting a new state constitution to replace its colonial frame of government. The government asked for town meetings to consider whether this would be acceptable.

Concord's meeting resolved that a sitting legislature was "by no means a Body proper to form & Establish a Constitution." Governments were not to be created by governments, but by people. Concord resolved that "it appears to this Town highly necessary & Expedient that a Convention, or Congress be immediately Chosen, to form & establish a Constitution, by the Inhabitants of the Respective Towns in this State, . . ." The town meeting of Boston asserted that in making such an important public decision pains must be taken to consult not only the legislature of Massachusetts but all the people in order to "Collect the wisest Sentiments" on the subject of the new constitution. Attleborough's town meeting, joined by many others, objected to granting the government the right to draft a new form of government because "the right of the Inhabitants of the Said

State to negative the Said form, or any Article in it when drawn is not expressly acknowledged. . . "

Undeterred, the state government of Massachusetts drafted the constitution of 1778. The proposed frame of government was sent to town meetings with a requirement that approval by two thirds of votes cast in the meetings was necessary to adopt the new constitution. A gathering of citizens in Essex County found much in the proposed constitution that was objectionable. In particular, the assembled citizens asserted

> *That a bill of rights, clearly ascertaining and defining the rights of conscience, and that security of person and property, which every member of the State hath a right to expect from the supreme power thereof, ought to be settled and established, previous to any ratification of any constitution for the State.*

Other meetings found the proposed constitution equally objectionable, and it failed to gain two thirds of the votes cast at town meetings.

In June of 1779 the state government of Massachusetts responded to this defeat by calling for a constitutional convention to draft a new state constitution. This convention, whose delegates were chosen specifically for the purpose, drafted a new constitution, the first part of which was a Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts. The town meetings once again debated, voted, and eventually approved the new constitution. The voters of Massachusetts, acting twice through a popular vote on a proposed course of public action, had exercised their fundamental right to create a government that satisfied them.

THE INITIATIVE AND REFERENDUM

Even with the development of settled representative governments, Americans have continued, in less revolutionary times, to occasionally exercise their right to govern themselves directly through the two processes of initiative and referendum. The initiative is a process by which citizens may propose laws and/or constitutional amendments and enact them by a popular vote without the involvement of state legislatures or governors. A *constitutional initiative* allows voters to propose and adopt amendments to their state constitution. *Statutory initiatives* allow voters to enact or amend a law. Initiative measures in states are placed on the ballot for a popular vote when a specified percentage of registered voters sign petitions calling for such a vote.

While the initiative allows popular initiation of constitutional amendments and laws, a referendum gives voters an opportunity to express their approval or disapproval of acts taken by their

governments. In essence, a referendum allows citizens to approve of or repeal an adopted state statute (*statutory referendum*) or approve of or reject a legislatively approved change in their state's constitution (*constitutional referendum*). Referenda in various states may be called at the instigation of the state legislature, called by popular petition, or are simply required for certain measures.

In almost every state proposed amendments to state constitutions that have been approved by the state legislature must be submitted to a constitutional referendum of the people. In sixteen states citizens may use the constitutional initiative process to propose and adopt amendments to their state constitutions. In over twenty states citizens may use the statutory initiative to bring proposed statutes to a popular vote. Additional states require statutory referenda in certain cases and/or allow the state legislature to call for a referendum on legislation it has approved. (Butler and Ranney, 1978: 69-73; Initiative Resource Center, Washington, D.C.) In addition, thousands of local referenda are held each year.

Given the role that initiatives and referenda have played in state and local governance, it is interesting that there has never been a *national* initiative or referendum in the United States. The simple reason for this is that the Constitution of the United States does not provide for direct citizen initiation of, or direct popular votes on, either statutes or constitutional amendments. Americans do not make national law directly through their votes. Instead, they choose representatives who make national policy.

Discussion of why there is no provision in the Constitution for national processes of initiative or referendum and whether there should be such provision leads inevitably to a discussion of questions about democracy and representation. Does the United States have a representative system of government only because it is impossible for the people to gather to conduct public business (an obstacle that initiatives and referenda seek to eliminate)? Or do we expect that our representatives and our representative form of government will produce better and wiser policies than the people themselves could? Are the people of the United States sufficiently well-informed to make wise decisions about public policy issues? Do they have enough regard for the rights and interests of those with minority points of view to avoid damaging these rights and interests? Should the people have the power, ultimately, to make policy directly when they are dissatisfied with the actions, or inaction, of their elected officials?

DEMOCRACY AND REPRESENTATION: THE FORMATIVE DEBATE

Concerns About Popular Government

In Federalist #10 James Madison described a "pure Democracy" as "a Society, consisting of a small number of citizens, who assemble and administer Government in person." One argument against an effort to create a pure democracy in America was that it was simply impossible to do so given the large territory and widely dispersed population of the United States. This much was obvious, but Madison asserted there were other reasons for avoiding pure democracy or trying to approximate it. He wrote, "Democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security, or the rights of property; and have in general been as short in their lives, as they have been violent in their deaths." The reason democracies presented such a sad spectacle, Madison wrote, was that a "common passion or interest" could easily animate a majority of citizens who would find it easy to work together to violate the rights of the "weaker party or an obnoxious individual."

That men were quite capable of invading the rights of their fellow citizens was a settled axiom of Anglo-American political thought in the eighteenth century. It was widely assumed that the human appetite for power threatened all political systems, however noble their origins and intentions, with degeneration into tyranny. The men who gathered in Philadelphia were history-minded, and their study of the history of ancient governments and of contemporary European systems taught them that monarchies tended to degenerate into tyrannies of one over all others, aristocracies into oligarchies in which a few oppressed the many, and democracies into mob rule and anarchy.

Most Americans certainly had no intention of fastening a monarchy on themselves after struggling so hard to cast one off. There was in America no formal aristocracy and most Americans were not interested in seeing one created. But the only apparent remaining alternative—a strongly democratic government—was not one that most of the framers of the Constitution were anxious to create. A number of states had experimented between 1776 and 1787 with systems of government in which popularly elected legislatures had dominated weak state executives and judiciaries, and the results seemed to some of the framers to be quite alarming.

The democratic nature of some of the new state constitutions had brought a new kind of man—often a small farmer or person of modest economic background—into government. Many such men found themselves being crushed by debt in the years following the end of the American war for independence. One favored approach to lightening this burden of debt was to have the states issue paper

money. In Rhode Island this was accomplished by adoption of a state law giving land owners loans of new paper money, with their land as security. When this paper money was made legal tender for payment of debts the usual relationship between creditors and debtors was reversed: debtors pursued creditors who wished to avoid being paid with what they regarded as worthless paper money. In response to this evasion the legislature of Rhode Island made it an offense to refuse paper money and allowed debtors to come to court, declare their debts, and pay them with paper money. Creditors were then informed that the debt had been discharged. As McLaughlin wryly notes, ". . . seven states entered on the difficult task of legislating their people into financial blessedness by the simple means of making money. . ." (McLaughlin, 1962: 106-107)

Paper money was issued in Massachusetts, but continuing economic distress led to calls for yet more relief. When none was forthcoming a group of armed men turned to the closing of courts and disruption of the processes by which mortgage foreclosures and debt collections were carried out. A rag-tag army of such hard-pressed and angry men gathered in Worcester, Massachusetts in 1786, hoping to generate enough pressure on public authorities to receive some relief. Under the "command" of Daniel Shays a group of twelve hundred such men moved, in search of supplies and arms, against the federal arsenal in Springfield. They were met near Springfield by a force of 4400 men gathered under the authority of of the state of Massachusetts. These troops scattered Shays' men and ended Shays' Rebellion.

The Philadelphia Convention

Such events in the states cast a long shadow over the experiment with popularly elected representative state governments and caused great concern among the men who wrote the Constitution. Americans had convinced themselves during the escalation of their conflict with England that they were especially well-suited for republican government, the aim of which was to pursue the "public good" rather than the private interests of any person or group (Bailyn, 1967; Wood, 1969). The design of most state governments reflected a commitment to the ides that government must pursue the public good and the belief that it would be most likely to do so when the public played a large role in selecting their representatives.

The framers of the Constitution shared this commitment to government by representatives, but they disagreed about how representatives were to be chosen and to whom they should be accountable. Should a theory of *actual representation* be translated into institutions in which representatives were popularly elected and given instructions on how to vote in pursuing the interests of their constituents? Or should a theory of *virtual representation* be translated into a system in which representatives who were more

insulated from public opinion and popular pressure would seek to identify and pursue the broader "public good?"

Madison's notes on the convention's discussion of representation indicate the belief of Roger Sherman that, "The people . . . immediately should have as little to do as may be about the Government. They want [lack] information and are constantly liable to be misled." Elbridge Gerry of Massachusetts, no doubt with the memory of Shays still fresh in his mind, joined Sherman by stating that, "The evils we experience flow from an excess of democracy. The people do not want virtue, but are the dupes of pretended patriots."

To these doubts about the character and capabilities of the people were added the concerns of those, like Charles Pinckney of South Carolina, who wished to maximize the influence of state governments in the work of the national government. Pinckney proposed that each state's legislature should choose its representatives in the House of Representatives. Otherwise, Pinckney worried, the state governments will "lose their agency" and "S. Carolina & other States would have but a small share of the benefits of Govt." John Dickinson of Delaware shared these concerns, comparing "the proposed National System to the Solar System, in which the States were the planets, and ought to be left to move freely in their proper orbits."

James Wilson replied that while he was not in favor of extinguishing these planets, "neither did he on the other hand believe that they would warm or enlighten the Sun." Wilson added that selection of members of the House of Representatives by state legislatures was undesirable because state legislatures have "an official sentiment" opposed to the aims and sentiments of a national government "and perhaps to that of the people themselves." Wilson was joined in this view by Alexander Hamilton and other "nationalists" at the convention.

But unlike Hamilton, Wilson opposed state legislative selection of Representatives not only because he wanted to avoid undue state influence in the national government, but also because he wanted to maximize the influence in the Congress of the people. He urged the popular election of members of both the House of Represenatives and the Senate. Wilson invoked the theory of actual representation in arguing that "Representation is made necessary only because it is impossible for the people to act collectively." If all citizens could not be gathered to make decisions then a representative government should possess "not only 1st the *force*, but 2dly the *mind or sense* of the people at large. The Legislature ought to be the most exact transcript of the whole society."

The convention eventually settled on a plan to have members of the House of Representatives popularly elected and members of the Senate chosen by state legislatures. As was so often the case during that summer in Philadelphia, opposing viewpoints were compromised. The national legislature was made subject to both popular influence (in the House) and state influence (in the Senate). The mode of election to the national legislature reflected both the belief that the people must have some direct influence on government and reservations about the people's ability to properly participate in their own governance. In addition to mixing both state and popular influence in the national legislature the Constitution appeared to provide for both actual representation in the House and virtual representation in the Senate.

But had the Constitution really provided for the actual representation of popular opinion? Was the democratically elected branch of Congress to be easily subject to public opinion?

The Ratification Debate

In describing and defending the Constitution's plan for representative government, Madison harkened back to the problems that arose in the governments of the states, citing complaints that these

> *. . . governments are too unstable; that the public good is disregarded in the conflicts of rival parties; and that measures are too often decided not according to the rules of justice, and the rights of the minor party; but by the superior force of an interested and over-bearing majority* (Federalist #10).

A great advantage of the proposed Constitution's representative form of government, Madison asserted, was that it would allow a great number of citizens from a large extent of territory to be brought together in an *extended republic*. Such a republic would contain a great diversity of groups and interests. The principle of majority rule in the legislature would serve to curb the pursuit by minority factions of the narrow interests of any particular interest group. And the multiplicity and geographic distance from each other of interest groups would discourage the emergence and effective operation of any majority faction that might threaten the rights of the numerical minority.

The Constitution's plan for representation had, Madison wrote, an additional advantage. Because members of the House of Representatives would be chosen in large districts with large constituencies

> *. . . it will be more difficult for unworthy candidates to practice with success the vicious arts, by which elections are too often carried; and the suffrages of the people being more free, will be more likely to centre on men who possess the most attractive merit, and the most diffusive and established characters.*

Madison believed that the popular election of members of the House of Representatives would bring to office men of considerable prominence who would "refine" the views of the public and pursue policies that showed a proper regard for the public good and a proper disdain for the political projects of special interests.

To all these checks against the mischiefs of "factious" influence in the House of Representatives the framers of the Constitution added additional checks against the role of popular factions in the national government. A Senate not chosen by popular election would have to approve any legislation passed by the House before it could go to the President. A President not chosen by popular election had the power to veto legislation. A Supreme Court chosen by the President with the consent of the Senate would judge the constitutionality of legislation.

Not surprisingly, some of the most important complaints raised by opponents of the proposed Constitution focused on the alleged absence in it of democratic processes and its overall "aristocratic tendency." Melancton Smith of New York, speaking to the New York ratifying convention about the Constitution's system of representation, argued

> *The idea that naturally suggests itself to our minds, when we speak of representatives, is, that they resemble those they represent. They should be a true picture of the people, possess a knowledge of their circumstances and their wants, sympathize in all their distresses, and be disposed to seek their true interests. The knowledge necessary for the representative of a free people not only comprehends extensive political and commercial information, such as is acquired by men of refined education, who have leisure to attain to high degrees of improvement, but it should also comprehend that kind of acquaintance with the common concerns and occupations of the people, which men of the middling class of life are, in general, more competent to than those of a superior class* (Kenyon, 1966: 382).

Smith wanted representatives to be attentive to the special concerns of their particular constituents. He also favored a larger number of representatives chosen in smaller districts, stating, ". . . the number of representatives should be so large, as that, while it embraces the men of the first class, it should admit those of the middling class of life" (Kenyon, 1966: 383).

Many opponents of the Constitution concluded, with Smith, that a small number of representatives serving large constituencies would prevent the common sort of American from being elected to the House of Representatives. This would preclude a desirable resemblance between the representative and the represented. The likely effect of this system of representation, opponents of the

Constitution thought, would be to diminish the power of the people within the only part of the proposed government whose members they would select. This "aristocratic" bias in the House of Representatives seemed intolerable given what many opponents of the Constitution regarded as the flatly undemocratic character of the remainder of the government.

Opponents of ratifying the Constitution also argued for the necessity of an advisory council to limit the power of the President, shorter terms and/or rotation of office for Senators and the President, allowing the states to recall Senators, and for a bill of rights to safeguard the rights of the individual. In the end, the Constitution was ratified as written, though only after its supporters agreed to propose amendments forming a Bill of Rights once the government was in operation.

THE DEMOCRATIC IMPULSE

Under the original Constitution the power of voters only reached directly as far as the House of Representatives. As the national government effectively asserted its supremacy over the state governments and as it began to make policies on taxes, banking, international commerce, transportation, the opening and settlement of western lands, and a variety of other issues that directly affected the welfare of millions of citizens, Americans began to demand a larger voice in their national government.

Manhood Suffrage

Among the changes demanded in the early 1800s was the expansion of the electorate by the removal of property qualifications for voting. "Manhood suffrage," voting by free white men, was common in the new states of the West, and by 1850 Virginia and North Carolina joined the other original states in adopting manhood suffrage. Because Article I, Section 2 of the Constitution specified that each state's members of the U.S. House of Representatives were to be chosen by the electorate that chose the most numerous branch of each state's legislature, the achievement of manhood suffrage in the states brought manhood suffrage to elections for the House of Representatives.

Choosing the President

By the time of John Adams' election to the presidency in 1796 serious conflicts over the policies of the national government had divided the nation's leaders into groups that eventually became political parties. As these parties sought to attract popular support they democratized the presidential selection process. By 1832 party conventions had replaced congressional caucuses as the mecha-

nism for nominating presidential candidates. These conventions, at least in theory and sometimes in fact, gave the parties' rank and file membership a greater voice in choosing candidates.

As parties became more prominent in nominating presidential candidates they transformed the operation of the electoral college. Candidates for selection to the electoral college were frequently pledged to a particular party and its presidential nominee. By 1832 every state but South Carolina had shifted the selection of these electoral college electors from the state legislators to voters. The *popular election of pledged electors* retained the *form* of the electoral college's mediation between voters and presidential candidates, but the discretion of electors was substantially reduced in favor of greater public influence in the selection of the President.

The Expanding Electorate

The demand for broader public participation in government and politics has led to significant expansions of the electorate. The Fifteenth Amendment, ratified in 1870 in the aftermath of a protracted and terrible civil war, forbade the denial of the vote on "account of race, color, or previous condition of servitude." In 1848 the Women's Rights Convention in Seneca Falls, New York echoed the Declaration of Independence in asserting that "all men and women are created equal" and that the history of mankind "is a history of repeated injuries and usurpations on the part of man toward woman, having in direct object the establishment of an absolute tyranny over her." Seventy years of pressure for women's suffrage eventually led to the ratification in 1920 of the Nineteenth Amendment, which gave women the vote in national elections.

The Twenty-Third Amendment—ratified in 1961—brought the voters of the District of Columbia into the presidential electorate. In 1964 the Twenty-Fourth Amendment banned the poll tax, which had been used to deprive many blacks of their votes. The Twenty-Sixth Amendment, ratified in 1971, extended the right to vote to eighteen year-olds.

Populists and Progressives

One period in American history, from 1890 to 1916, saw a particularly strong upsurge of public pressure for democratizing reform in American politics. The rapid development of American business and industry during and after the Civil War had brought into existence large and powerful corporations whose activities were not regulated to any great extent by government. Many Americans felt economically powerless against such large organizations and complained that government and politics were increasingly dominated by the interests of corporate capital.

The 1892 platform of the new Populist Party presented in dramatic terms the complaints of its members against the domination of American society by business interests:

> *The newspapers are largely subsidized or muzzled, public opinion silenced, business prostrated, homes covered with mortgages, labor impoverished, and the land concentrating in the hands of capitalists. . . . The fruits of the toil of millions are boldly stolen to build up colossal fortunes for a few, unprecedented in the history of mankind; and the possessors of these, in turn, despise the Republic and endanger liberty. From the same prolific womb of governmental injustice we breed the two great classes—tramps and millionaires.* (Levy, 1982: 293)

These economic wrongs would not be righted by the Democratic or Republican Party, the Populists argued, because both parties were servants of business interests:

> *We have witnessed for more than a quarter of a century the struggles of the two great political parties for power and plunder, while grievous wrongs have been inflicted upon suffering people. We charge that the controlling influences dominating both these parties have permitted the existing dreadful conditions to develop without serious effort to prevent or restrain them. . . . They propose to sacrifice our homes, lives, and children on the altar of mammon; to destroy the multitude in order to secure corruption funds from the millionaires.* (Levy, 1982: 293)

The Populists asserted that the answer to this political problem was more democracy. They favored the secret ballot (which would shield voters from efforts to influence and intimidate their votes), direct popular election of U.S. Senators, and the use of the initiative and referendum.

While the economic analysis and rhetoric of the Populists got a cold reception from many Americans, Populist complaints about the domination of the political process by special interests and corrupt parties found a large and responsive audience. The Progressive Movement, which succeeded the Populists, sought to accomplish a number of the Populists' reforms in American politics. The Progressive Movement's greatest achievement at the national level was the adoption of the Seventeenth Amendment, which provided for popular election of U.S. Senators. Progressives successfully pressed for the use of the secret ballot in elections, regulation of political parties, and use of nonpartisan elections at the local level. They also led the fight for direct democracy in the states, urging the adoption by the states of the initiative and referendum processes.

The Progressive Movement was an extremely diverse one, claiming both Democratic and Republican adherents, like Wood-

row Wilson and William Allen White. But the Progressive Movement had a key unifying concern: the growth of large and powerful organizations—big corporations, organized labor, and party political machines—and their influence on American society and politics. Progressives feared that such organizations undermined the role in American life and American politics of the "unorganized individual." Against the power of such groups, which wielded money, votes, and patronage to pursue their special political aims the Progressives hoped to muster the power and the votes of the average citizen.

Progressives and the Case for Initiative and Referendum

The processes of initiative and referendum seemed to Progressives to be an ideal way to reinstate the political power of the average American who was not part of an organized interest group. The Progressives' argument for the initiative and referendum made several key claims. First, through the processes of initiative and referendum any issue of real concern to voters could be discussed, addressed, and voted on. While both interest groups and political parties might wish to keep certain issues off the political agenda, the people could place key issues squarely before the voters. Second, the initiative and referendum would bring public decisions close to the people instead of leaving them to be shaped by the interests of parties, legislators, and lobbyists. Third, the initiative and referendum would ensure that public decisions were made publicly instead of in smoke-filled rooms. Fourth, the Progressives asserted that initiatives and referenda would accurately reflect the public will without the distorting influence of parties, legislators, and interest groups. Fifth, the initiative and referendum would end the citizen apathy and alienation that had grown because of the domination of governments by interest groups, legislators, and boss-controlled parties. Finally, it was asserted that the *true* public interest could be best perceived and pursued by the average "Man of Good Will" who participated in initiatives and referenda. (Butler and Ranney, 1978: 29-33).

The push for direct democracy succeeded, between 1898 and 1914, in winning the amendment of state constitutions to allow initiatives and/or referenda in South Dakota, Utah, Oregon, Montana, Oklahoma, Maine, Missouri, Arkansas, Colorado, Arizona, California, Idaho, Nebraska, Nevada, Ohio, and Washington. The pioneering spirit of the relatively new states of the West was reflected in their early adoption of the initiative and referendum.

NATIONAL INITIATIVE AND REFERENDUM

Americans have made changes in their political system at both the state and national levels that would, no doubt, astound the framers

of the Constitution. In the national government only the federal judiciary has not been made substantially more dependent on the will of the people as expressed in elections. Limits on participation in elections based on property, race, sex, and age have all been eliminated. In the states the initiative and referendum have greatly extended the power of Americans to act directly to make and repeal laws and to change their state constitutions. Americans, from all appearances, have become both increasingly confident of their ability to participate in government and increasingly assertive, often in the face of considerable resistance, in their demand to be allowed to participate.

Some Americans believe that amending the Constitution to allow direct popular votes on statutory and Constitutional issues is the *logical and desirable next step* in the on-going process by which our national government has been democratized. Others think such amendments would be a *fundamental and ill-advised departure* from the principle and practice of democratically elected but, in the last analysis, representative government.

Past Proposals

The movement for direct democracy moved from the state to the national level in 1907, when Representative Elmer Fulton of Oklahoma introduced House Joint Resolution 44. This resolution, which made no progress in the amending process, would have amended the Constitution to provide for national initiatives on both proposed statutes and constitutional amendments.

In the 1916 presidential campaign the supporters of President Woodrow Wilson advised voters that, while war raged in Europe:

> *You are working, not fighting!*
> *Alive and happy, not cannon fodder!*
> *Wilson and peace with honor?*
> *Or*
> *Hughes with Roosevelt and war?*

Many Americans were not convinced that this would long remain the case because of loan arrangements that led to the shipment of U.S. munitions to Britain. Such notable reformers as William Jennings Bryan, Robert LaFollette, and Jane Addams supported a proposal to require a national referendum on any declaration of war. After Wilson's reelection the proposal was the subject of congressional hearings in February 1917. By March of 1917 American merchant seamen were arming themselves against anticipated attacks by German submarines and on April 6th German attacks on American shipping prompted a U.S. declaration of war.

Disillusioned by America's involvement in World War I and chagrined by the harsh peace that followed it, Americans turned

again to the war referendum proposal as war menanced Europe in the late 1930s. Congressman Louis Ludlow's "Ludlow Amendment" calling for a war referendum went further in the legislative process than any national referendum proposal before or since. The proposed amendment came to the floor of the House of Representatives in December of 1937. President Franklin Roosevelt lobbied for the defeat of the proposal. A House vote of 188 in favor, 209 opposed fell well short of the two-thirds vote needed for the proposed amendment to advance further.

Recent Proposals

The most recent significant proposals for national direct democracy were advanced in 1977. These proposals were responses to a perceived loss of effective popular contact with and control over national policymakers. An unpopular war in Vietnam and revelations about what the American people were not told about it, the resignation in disgrace of a President during the Watergate scandal, and emerging scandals in Congress all contributed to sinking levels of public satisfaction with and confidence in their national leaders. It was against this backdrop that, in December of 1977, the Subcommittee on the Constitution of the Senate Committee on the Judiciary held two days of hearings on two national initiative proposals.

In introducing Senate Joint Resolution 67, 95th Congress, 1st Session, sponsored by himself and Senator Mark Hatfield, Senator James Abourezk stated that,

> *The last few years have seen a growing dissatisfaction, and in many cases a serious distrust, of Government by the very people who are its source of power and who elect its leaders. People stay home on election day not because they are lazy or do not care but because they have decided that meaningful communication with their leaders is no longer possible or effective.*

Echoing an earlier Progressive theme, Abourezk continued,

> *. . . much of the alienation and helplessness that citizens experience can be mitigated if avenues for constructive participation exist. The initiative procedure is one means to provide direct citizen access to our governmental decision-making process through a legal and democratic method.* (Hearings on Voter Initiative Constitutional Amendment)

Among the key features of the Abourezk-Hatfield proposal were the following:

- The people of the United States would have the power to propose and enact laws, except with respect to carrying out the powers granted to Congress in clauses 11 and 15 of Article I, section 8, of the U.S. Constitution.
- The proposal did not grant the people of the United States the power to propose amendments to the Constitution.

- A law could be proposed by presenting to the Attorney General of the United States a petition containing the text of the proposed law and signatures, collected within the eighteen months prior to the presentation of the petition, of registered voters equal in number to three per cent of the ballots cast in the last general election for President, including the signatures of registered voters in each of ten States equal in number to three per cent of the ballots cast in the last general election for President in each of the ten States.
- Within ninety days of receiving such petitions, the Attorney General would determine the validity of the signatures on the petitions through consultation with the appropriate states. Upon a determination that the petitions contain the required number of valid signatures, the petition would be certified and the proposed law would be placed on the ballot at the next general election held for choosing Members of the House of Representatives occurring at least one hundred and twenty days after such certification.
- A proposed law would be enacted upon approval by a majority of the people casting votes, and would take effect thirty days after approval.
- Any law enacted in this way would be a law the same as any other law of the United States, and could be held unconstitutional by the Supreme Court.
- A law enacted through the initiative and referendum process could be repealed by Congress by a two-thirds vote in each house.

In an interesting departure from earlier proposals that were particularly concerned with war powers, S.J. Res. 67 specifically precluded initiatives touching on the declaration of war (clause 11, Article I, Section 8) and the calling of state militia (clause 15, Article I, Section 8). And unlike Fulton's 1907 proposal, statutes initiated through the processes specified in S.J. Res. 67 would be liable, just as are all other statutes, to being judged unconstitutional by the national judiciary.

Also introduced during the 1st Session of the 95th Congress was House Joint Resolution 544, whose prime sponsor was Representative Guy Vander Jagt. There are two key differences between this proposal and the Abourezk-Hatfield proposal. First, a successful initiative would require not a simple majority of all voters but a majority of votes cast in each of three quarters (38) of the States. Second, a three-fourths vote of both houses of Congress, rather than a two-thirds vote, would be necessary for Congress to reverse the action of the people. The same majority of votes in three quarters of the States would be needed for the repeal of a law or a provision of a law.

The amendments proposed in 1977 did not involve proposals for national constitutional initiative or referendum processes. A consti-

tutional initiative process would allow voters to propose amendments and put them to a national popular vote by gathering a specified number of signatures on a petition. Such a process would supplement, or could conceivably replace, the current amending process. A constitutional referendum process would require a popular vote on constitutional amendments approved by Congress. Another option not discussed during the 1977 hearings is the statutory referendum, a process that could work in several ways. Congress and the President could be required to submit certain types of legislation to a popular vote before they could become law. Or Congress and the President might be given the option of referring some legislation to a popular vote. Finally, a process could be established that would employ a popular petition to require that a statute approved by Congress and the President be submitted to a popular vote.

Obviously, some of these alternatives are more sweeping than others and hence would be more controversial. Statutory initiatives and referenda would be subject to both repeal by Congress and invalidation by the Supreme Court. Constitutional changes enacted by popular vote would become part of the nation's fundamental charter and could only be changed or removed by subsequent amendment. Debate about all proposals for direct democracy, though, would focus on arguments about the comparative merits of democratic and representative forms of government.

ARGUMENTS FOR A NATIONAL INITIATIVE AND REFERENDUM PROCESS

- The use of initiatives and referenda would be an exercise by the people of their sovereign power to govern themselves. This is the logical next step in democratizing American national government.
- Initiatives and referenda actualize Americans' First Amendment right "to petition the Government for redress of grievances" and allow them to act for themselves when elected representatives fail to do so.
- A national initiative/referendum process would lessen both the sense of alienation and resulting apathy of millions of Americans by providing them a concrete way to participate in the making of public policy.
- A national initiative/referendum process is a natural complement to our system of representative government because it would correct that system when it loses touch with the wishes of the majority.

- The initiative and referendum would free our nation's policy-making process from the undue influence of groups with special or narrow interests.
- Initiatives and referenda would enhance the accountability of government. And they can be avoided so long as representatives pursue the policy preferences of the majority.
- National initiatives and referenda would produce an open, educational debate about problems and issues that might otherwise by inadequately discussed or not acted upon.

ARGUMENTS AGAINST A NATIONAL INITIATIVE AND REFERENDUM PROCESS

- Initiatives and referenda will not enhance citizen participation because many citizens—particularly those who are alienated and apathetic—are very unlikely to make the effort needed to acquire information about ballot issues.
- If the chance to cast one vote out of hundreds of thousands in congressional elections does not bring the apathetic voter to the polls, the chance to cast one vote out of millions on a ballot question will not.
- Initiatives and referenda complicate the ballot by adding issues that are too technical and complicated for many voters to understand. They discourage voting.
- The process of placing initiative and referendum questions on the ballot and then winning the election is so complicated and expensive that only already mobilized and well-financed constituencies will succeed in putting their concerns before voters. Rather than decreasing the influence of special interest groups, initiatives and referenda will increase their impact.
- A national initiative/referendum process could be used for regressive purposes and attacks on the rights and interests of minority groups. In 1964, for instance, California voters used the process to repeal that state's fair housing law.
- A national initiative/referendum process will have a polarizing and fragmenting affect on American society by bringing highly divisive issues to a yes or no vote. For the good of the country some highly divisive issues are better handled in a legislative process that encourages discussion, moderation, compromise, and consensus.

CONCLUSION

The truth about the likely impact of national initiative and referendum processes is, no doubt, less tidy than one would gather from the claims of their advocates or detractors. It is true, for instance, that the referendum process has been used in ways that damaged the interests of minority groups. But the same results have been produced by representative governments at both the state and national levels. It is true that the initiative/referendum process could heighten citizen awareness of and interest in political questions. It is also true that this heightened awareness could bring heightened emotion and acrimony to our political life.

Questions about the capabilities of citizen voters do not admit of pat answers either. It is undeniable that many citizens lack information about public issues and do not participate very much in our nation's public life. The question is whether widespread citizen apathy and lack of information is a normal state of affairs or whether it is a product of a representative system that leaves us to *decide who decides* on policy issues instead of deciding for ourselves.

POINTS OF VIEW

Abourezk says six of the last 10 constitutional amendments "have in some way extended voting rights," so the initiative would be just "a further step in this evolutionary process." But the initiative would be decisively different; it would not expand the electorate, it would alter the function of the electorate. Only the 17th Amendment—popular election of senators—did that. And the initiative would do so at the expense of the principle of representation.

Advocates of the initiative say representative government is "government by elites": the representatives and the "interests" who lobby them. But any national initiative would be dominated by an intense, unelected minority using direct mail, television commercials and other techniques of mass persuasion. (George Will, Washington Post, July 28, 1977)

Will believes people should not govern or decide issues, but are supposed "to decide who will decide." He states that public policy "is best given shape by representative institutions, which, unlike 'the people,' are deliberative bodies." Those of us who favor the initiative process believe that an educated and well-informed public, operating in an atmosphere of unrestrained First Amendment rights, is fully capable of acting as a deliberative body.

Contrary to Will's suggestion that it would undermine our representative form of government, the initiative process would provide a much-needed complement to the system. To an electorate frustrated by a Congress unwilling to act, it provides another democratic means to bring about change. To the federal government itself, the initiative process would provide another check in our system of checks and balances, a dilution of centralized power. (James Abourezk, Washington Post, August 10, 1977)

The education value and politicization potential from a national initiative could be substantial. Thousands of people would be involved in any national initiative campaign on one side or the other. Furthermore, the public's attention would be focused on debate and discussion of the merits or demerits of public policy issues rather than just on style, looks, image, and other similar aspects of many modern campaigns. Furthermore, the debate would be in public and in the open. . . . The initiative process will provide one more way for the vox populi to speak and, more importantly, it will permit them to act rather than simply react to actions taken by others. (Larry Berg, testimony at hearings on Voter Initiative Constitutional Amendment, December 13-14, 1977)

The political arena which it [the initiative process] creates will be preempted by groups that have money, that have organization, that have political skill, and that have power. (Peter Bachrach, testimony on Voter Initiative Constitutional Amendment, December 13-14, 1977)

In the end, in fact, the real issue . . . is whether or not America believes in democracy, and believes it can afford the risks that go with democratic life. All of the objections to it are so many different ways of saying "the people are not to be trusted"—a skepticism which, it is perfectly true, can be traced back to the "realism" and cynical elitism of a significant group of constitutional fathers. . . if Americans sometimes seem unfit to legislate, it may be because they have for so long been passive observers of government. The remedy is not to continue to exclude them from governing, but to provide practical and active forms of civic education that will make them more fit than they were. Initiative and referendum processes are ideal instruments of civic education . . . (Benjamin Barber, statement on Voter Initiative Constitutional Amendment, December 13-14, 1977)

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